

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

JASON LEE VAN DYKE
Plaintiff

v.

THOMAS CHRISTOPHER RETZLAFF
a/k/a Dean Anderson d/b/a BV Files, Via
View Files L.L.C., and ViaView Files
Defendant

§
§
§
§
§
§
§
§

Case No. 4:18cv247

JOINT MOTION FOR CLARIFYING ORDER

Plaintiff, Jason Lee Van Dyke, and Defendant, Thomas Christopher Retzlaff,
respectfully request that this Honorable Court enter a clarifying order concerning discovery
in the above-captioned case.

I. FACTS

1. Plaintiff is Jason Lee Van Dyke. Defendant is Thomas Christopher Retzlaff.
2. This case was removed to this Court from the 431st District Court in and for Denton County, Texas on April 10, 2018. On the same day, Defendant timely filed a *pro se* motion to dismiss this proceeding pursuant to the Texas Citizens Participation Act ("TCPA"). ECF 5. Defendant subsequently retained counsel in this case and timely filed an amended motion to dismiss under the TCPA on May 22, 2018. ECF 44.
3. Plaintiff completed and served his Rule 26 disclosures on April 12, 2018. Defendant has objected to the completion of Rule 26 disclosures based upon the language of the TCPA, which imposes a stay on discovery until a court has ruled on the motion. See ECF 41 (citing Tex. Civ. Prac. & Rem. Code § 27.003(c)).
3. A Rule 26 scheduling conference was held in this case at 9:00 a.m. on May 31, 2018. At that hearing this Court denied as moot the *pro se* TCPA motion filed by Defendant.

This Court has not yet ruled on the amended TCPA motion filed by Defendant's counsel. ECF 44.

4. Plaintiff has responded to Defendant's TCPA motion alleging, in part, that the TCPA is not applicable in federal court in light of *Erie R.R. Co. v. Tompkins*. 304 U.S. 64 (1938). Defendant has argued that the TCPA is substantive and that *Erie* is inapplicable to the TCPA.
5. The question of the applicability of the TCPA in federal court, combined with the completion of the Rule 26 conference in this case, has created a dispute between the parties concerning the discovery period in this case. The parties now jointly seek a clarifying order from this Court.

II. ARGUMENTS OF THE PARTIES

6. Defendant would show to this Court that discovery in this case remains stayed pursuant to the clear language of Tex. Civ. Prac. & Rem. Code § 27.003(c), which stays discovery in a case where a TCPA motion has been timely filed until such a time as the motion has been determined by the Court.
7. Plaintiff would show this Court that it may immediately begin conducting discovery pursuant to Rule 26(d) of the Federal Rules of Civil Procedure because (a) the parties have conferred as required under Rule 26(f); (b) the Federal Rules of Civil Procedure do not expressly authorize a further stay of discovery in this case; (c) the parties have not stipulated to a stay of discovery in this case; and (d) this Court has not ordered a stay of discovery in this case.

III. CONCLUSION

8. The parties have conferred and are in agreement that a clarifying order from this Court is necessary to avoid a potentially costly dispute concerning discovery prior to this Court's determination of Defendant's TCPA motion.

IV. PRAYER

9. The parties now pray that the Court enter an order clarifying that either (a) the parties may immediately begin discovery in this case; or (b) discovery in this case is stayed pursuant to Rule 26(d)(1) until such a time as the Court has considered and made a ruling on Defendant's TCPA motion.

Respectfully submitted,

/s/ Jason Lee Van Dyke

Jason L. Van Dyke
State Bar No. 24057426
108 Durango Drive
Crossroads, TX 76227
P – (469) 964-5346
F – (972) 421-1830
Email: jason@vandykelawfirm.com

Pro Se Plaintiff

/s/ Jeffrey L. Dorrell

Jeffrey L. Dorrell
State Bar No. 00787386
Federal ID # 18465
14201 Memorial Drive
Houston, Texas 77079
Telephone 713-522-9444
Fax: 713-524-2580
Email: jdorrell@hanszenlaporte.com

Attorney for Defendant